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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS,

*Petitioners,*

vs.

PRO-CHOICE NETWORK OF WESTERN
NEW YORK, ET AL.,

*Respondents.*

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

## BRIEF OF AMICI CURIAE, THE STATES OF CONNECTICUT, ET AL., IN SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST

The amici curiae states, through their attorneys general, respectfully submit this brief in support of the Respondents. The amici support affirmance of the decision of the United States Court of Appeals for the Second Circuit upholding two provisions of an injunction which was issued to prevent further violence and obstruction outside of reproductive health care facilities in Western New York.

The amici states have a strong interest in the issues presented in this case, which directly relate to the ability of the states to protect the public health and safety by promoting orderly access to, and availability of, medical services, including reproductive health services. The states' interests in medical safety and privacy, as well as in protecting the public safety and order, and in controlling the costs of, and burdens on, law enforcement, are implicated by this case.

After this Court's decision in Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), Congress sought to provide the state attorneys general with a federal cause of action to assist them in protecting these interests. The result of this effort is the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248. FACE permits the Attorney General of the United States, as well as the state attorneys general, to seek temporary, preliminary and permanent injunctive relief against persons who use force, threats of force or physical obstruction with intent to injure, intimidate, or interfere with those providing or seeking to obtain reproductive health services. Id. Although this case does not arise under FACE, it is likely to have a direct effect on the scope of injunctive relief available under FACE. The state attorneys general have a strong interest in ensuring that the injunctive relief available under FACE is sufficient to protect the public health and safety.

## SUMMARY OF ARGUMENT

Violence and blockades at reproductive health care facilities pose an increasingly serious threat to public safety on the federal, state and local levels. As the availability of legal abortions diminishes, the states are increasingly concerned with ensuring safe and adequate access to reproductive health care, while at the same time protecting the First Amendment rights of non-violent protesters. The nationwide campaign of violence and obstruction, aimed at eliminating the availability of abortion services, has created an overwhelming burden on law enforcement, with its accompanying costs. Further, the states have an interest in minimizing the medical risks to patients who seek access to reproductive health care facilities, as well as in protecting the privacy of the "captive audience" seeking health care in facilities which are the subject of violence and blockades.

Injunctions which have as their goal the elimination of violence and blockades should be crafted with careful attention to the facts of the particular case. Courts must strike a delicate balance between the need to protect the fundamental rights of freedom of speech and assembly on the one hand, and the duty of the government to protect the right of the citizens to safe and adequate access to health care, including reproductive health care, on the other.



## ARGUMENT

In Madsen v. Women's Health Center, 114 S. Ct. 2516 (1994), this Court examined an injunction which, like the one at issue in this case, was designed to protect the health and safety of persons seeking to provide and obtain reproductive health services.[1/] As in the instant case, the petitioners in Madsen claimed that the injunction violated their right of free speech, guaranteed by the First Amendment to the United States Constitution.[2/] Id. at 2521.

This Court, in finding that the injunction in Madsen was content-neutral, explained that "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based." Id. at 2524 (citations omitted). Therefore, the Court explained, the constitutionality of the injunction was not properly assessed by application of the strictest scrutiny. Id. However, because an injunction carries "greater risks of censorship and discriminatory application" than a statute or ordinance, injunctions require "somewhat more stringent application of First Amendment principles . . . ." Id.

Accordingly, the Court concluded that the proper inquiry in evaluating the constitutionality of an injunction is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant

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1/ In Madsen, this Court upheld a 36-foot stationary buffer zone as it applied to property around the clinic entrances and parking lot, but struck it down as it applied to property at the back and side of the clinic. 114 S. Ct. at 2527-28. Further, the Court upheld noise restrictions, but struck down provisions controlling the use of signs, as well as a 300-foot "no approach zone." Id. at 2528-29. Finally, the Court struck down a 300-foot buffer zone around the residences of clinic staff. Id. at 2529-30.

2/ The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend I.

government interest." Id. at 2525 (citations omitted). It is within this framework that the instant injunction is properly evaluated.

## I. THE STATES HAVE A SIGNIFICANT INTEREST IN ENSURING SAFE AND ORDERLY ACCESS TO HEALTH CARE

In Madsen, this Court identified three governmental interests which, in combination, were "quite sufficient to justify an appropriately tailored injunction to protect them." Id. at 2526. First, the state has an interest in ensuring safe and adequate access to health care, including reproductive health care. Id. Second, there is a strong governmental interest in protecting the public safety and order, as well as in protecting property and promoting the free flow of traffic on streets and sidewalks. Id. Finally, the state has an interest in what this Court termed "medical privacy." Id. Each of these interests is present here.

### A. The States Have an Interest in Protecting Access to Health Care

In its consideration of FACE, Congress was presented with stunning statistics regarding the effects of clinic violence on the availability of reproductive health care. Congress found that 83 percent of all counties in the United States do not have an abortion provider, and that clinic violence and intimidation are at least partially responsible for this shortage. H.R. Rep. No. 306, 103d Cong., 2d Sess., 8 (1993), reprinted in 1994 U.S. Code Cong. & Admin. News 699, 705 (hereinafter "House report"); S. Rep. No. 117, 103d Cong., 1st Sess., 17 (1993)(hereinafter "Senate report")(citing Stanley K. Henshaw and Jennifer Van Vort, "Abortion Services in the United States, 1987 and 1988," Family Planning Perspectives, vol. 22, no. 3 (May/June 1990), at 106).



Congress found that there has been a "nationwide campaign of blockades, invasions, vandalism, threats and other violence," which is "barring access to facilities that provide reproductive health services." House report at 6. Between 1977 and 1993, there were more than one thousand acts of violence at reproductive health care facilities, including 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, 327 clinic invasions and 1 murder. House report at 6-7; Senate report at 3. Over 6,000 clinic blockades and other disruptions were reported during that same time period. House report at 7 (citation omitted).

Although reports of clinic violence have decreased somewhat since the passage of FACE in 1994, one-third of the clinics responding to the Feminist Majority Foundation's 1995 clinic violence survey reported at least one incident of "the most severe forms of clinic violence, including death threats, stalking, bomb threats and bombings, chemical attacks, blockades, invasions, and arson and arson threats." Feminist Majority Foundation, 1995 Clinic Violence Survey Report 2 (1995)(hereinafter "1995 Violence Survey"). One result has been significant staff resignations, the majority of which were the result of the murders of two clinic workers in Brookline, Massachusetts on December 30, 1994. Id.

Violence and blockades have resulted in a "severe shortage of qualified providers available to perform safe and legal abortions in this country." Senate report at 3. Clinic violence has an impact beyond abortion, "on the delivery of a wide range of health care services." Senate report at 14. The vast majority of reproductive health care clinics -- 94.8 percent of the 310 clinics responding to the 1995 violence survey -- provide general health services in addition to abortion, including birth control (94.8 percent); cancer screening (68.1 percent); pre-natal care (24.8 percent); menopause treatment (58.1 percent); adoption and referral services

(22.3 percent); tubal sterilization (29.7 percent); infertility treatment (26.8 percent); treatment of premenstrual syndrome (51.6 percent); AIDS testing (60 percent); reproductive health counseling (83.2 percent); pregnancy counseling (86.8 percent); and testing and treatment for sexually transmitted diseases (82.3 percent). 1995 Violence Survey at 1. The availability of all of these health care services is jeopardized by persistent anti-abortion violence and obstruction at health care facilities.

Thus, the American Medical Association's Executive Vice President told Congress that, "'[u]nless the issue of continued violence at health care facilities is directly confronted, the practice of medicine will be severely affected.'" Senate report at 16 (quoting Hearings on S. 636 Before the Senate Labor and Human Resources Committee, 102nd Cong, 2nd Sess. (May 11, 1993)(statement of Dr. James S. Todd, Executive Vice President, American Medical Association)). This is no accident. It is the "express purpose of the violent and threatening activity . . . to deny women access to safe and legal abortion services." Senate report at 11. The field director of Operation Rescue National has declared that "'[w]e may not get laws changed or be able to change people's minds, . . . [b]ut if there is no one willing to conduct abortions, there are no abortions.'" Senate report at 11 (quoting Boodman, "The Death of Abortion Doctors," Washington Post, Apr. 20, 1993).

The remedy of injunction is of particular importance in addressing the issue of access. Attorney General Janet Reno testified that the civil remedy of injunction is necessary to address massive blockades because "'[c]ourts can fashion injunctive relief that will keep clinics operating.'" Senate report at 26-27 (quoting Hearings on S. 636 Before the Senate Labor and Human Resources Committee, 102nd Cong, 2nd Sess. (May 12, 1993)(statement of Janet Reno,



Attorney General)). In fact, over one third of the clinics responding to the 1995 violence survey are currently protected under civil injunctions. 1995 Violence Survey at 11.

Thus, the states' interest in preserving the availability of health care is directly related to the need for injunctive relief to address a broad range of violent and obstructive conduct. Although other civil and criminal remedies may be available in some jurisdictions, as well as under FACE, injunctions provide the states with the necessary flexibility to protect access to health care. This strong state interest justifies the remedy of injunction in and of itself; in conjunction with the states' other interests, the support for injunctive relief is overwhelming.

### B. The States Have an Overriding Interest in Public Safety

As this Court recognized in Madsen, "[t]he State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." 114 S. Ct. at 2526 (citation omitted). Indeed, "the preservation of liberty depends in part upon the maintenance of social order." City of Houston v. Hill, 482 U.S. 451, 472 (1987)(citing Terminiello v. Chicago, 337 U.S. 1, 37 (1949)). Much of the responsibility for the law enforcement response to violence and blockades at reproductive health care facilities falls upon the states and their political subdivisions. See, e.g., 1995 Violence Survey at 8 (the majority of FACE reports that clinics made to federal officials were referred to local law enforcement).

The states certainly have an interest -- in fact, a duty -- "to regulate the use of city streets and other facilities to assure the safety and convenience of the people . . . ." Cox v. Louisiana, 379 U.S. 536, 554 (1965)(citations omitted).

In fact, that duty is broader than the mere maintenance of order. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." Kovacs v. Cooper, 336 U.S. 77, 83 (1949).

There can be no doubt that the need for protection exists. One-fifth of all reproductive health care clinics responding to the 1995 violence survey reported FACE violations to federal or state authorities in 1995. 1995 Violence Survey at 8. "Throughout the country, pro-life groups have organized blockades designed to bar access to reproductive facilities and overwhelm local law enforcement." House report at 7. The levels of clinic violence are directly correlated to the law enforcement response; thus, decreases in clinic violence in 1995 were directly related to increased efforts on the part of law enforcement. 1995 Violence Survey at 10, 12.

Accordingly, the burdens on, and costs of, law enforcement as a result of ongoing clinic violence remain substantial. In considering FACE, Congress found that the large blockades in Wichita, Kansas and Buffalo, New York, as well as smaller blockades around the country, "place a significant strain on local law enforcement and judicial resources . . . ." House report at 3. For example, the Buffalo blockades, known as the Spring of Life, resulted in 605 arrests and law enforcement costs of $383,250. House report at 7; Senate report at 9. Congress was deeply concerned by the self-professed strategy of the anti-abortion movement to overload law enforcement and judicial resources so that they would fail.[3/] Senate report at 11. This strategy only

[3/] The Senate cited Randall Terry, To Rescue the Children 49 (1986)("You should check how overloaded the city's jail and court systems are. In many, many cities, the courts and jails are too



magnifies the need for, and costs of, law enforcement to combat clinic violence.

It is in this respect that the state interest is at its strongest. The duty of the government to maintain order and safety is fundamental. "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." Cox, 379 U.S. at 554. This strong state interest more than justifies the granting of injunctions to assist law enforcement in maintaining order and safety outside of reproductive health care facilities.

### C. The States Have an Interest in Protecting Medical Privacy and Safety

Finally, this Court, in Madsen, recognized the state's "strong interest in residential privacy . . . applied by analogy to medical privacy." 114 S. Ct. at 2526 (citing Frisby v. Schultz, 487 U.S. 474 (1988)). This interest stems from the realization that "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." Id. (citation omitted).

This Court has consistently followed the well-established rule that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." Cohen v. California, 403 U.S. 15, 21 (1971). Thus, when it is possible for the listener or viewer to "'avoid further bombardment of [his] sensibilities simply by averting [his] eyes,'" the Constitution does not permit the government to step in. Erznokzik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975)(quoting Cohen,

overloaded to deal with rescue missions").

403 U.S. at 21). Where, however, this Court has recognized that a substantial privacy interest in access to reproductive health care exists, see, e.g., Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 766 (1986), and that this interest is being impeded "in an essentially intolerable manner," Cohen, 403 U.S. at 21, narrowly tailored restrictions on speech are permissible.[4/]

In its consideration of FACE, Congress relied on the findings of the trial court in this case regarding the adverse effects of "targeted picketing" of facilities that perform abortions on the "psychological and physical well-being" of patients, including patients who are there to obtain services other than abortion.

> "[T]he risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery."

Senate report at 15 (quoting Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992)).

Other medical risks accrue if completion of the procedure is delayed. Id. (citing Pro-Choice Network, 799 F. Supp. at 1427)(once laminaria is inserted to begin dilation of the cervix, timely removal is necessary to avoid infection, bleeding and other potentially life-threatening complications). As Congress noted, this danger is not hypothetical. In National Organization for Women v. Operation Rescue, 726 F. Supp. 1483, 1490 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd on other grounds sub nom Bray, 506 U.S. 263 (1993), the court found that one result of the blockading of a District of Columbia clinic for 11 hours was that five women who had begun the abortion procedure by having laminaria inserted the day before were unable to return to the clinic to complete the procedure. Senate report at 16.[5/]

Perhaps the anecdotal evidence offered in support of these findings is the most impressive. Sylvia Doe, of Virginia, was advised by her doctor to have an abortion for health reasons. Clinic Blockades: Hearings on S. 636 Before the Subcommittee of Crime and Criminal Justice of the Senate Labor and Human Resources Committee, 102nd Cong., 2nd Sess. 10 (1992)(hereinafter "Hearings")(statement of Sylvia Doe). Because there was no provider of late-term abortions in her state, she was forced to travel to

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4/ Not only is there a recognized right to privacy in matters pertaining to reproductive health care, but courts also have recognized that "[p]rivacy essential to individual dignity and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights." Galella v. Onassis, 487 F.2d 986, 995 n. 12 (2d Cir. 1973)(citing Katz v. United States, 389 U.S. 347, 350 n. 5 (1967)(other citations omitted)). Thus, "[a] group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." Cox, 379 U.S. at 555. Yet, that is precisely what so-called "sidewalk counselors" purport to be permitted to do in exercise of their right to freedom of speech.

5/ Anti-abortion protest has other effects on medical privacy and safety. For example, in Portland, Oregon, anti-abortion protesters impeded the passage of ambulance attendants who had been called to a clinic to transport a patient to a hospital in a medical emergency. Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681, 683 (9th Cir. 1988).

Kansas to obtain the necessary services. Id. When she arrived, she found that Operation Rescue had blockaded the clinic. Id. She waited for two weeks while the clinic was entirely closed. Id. When the clinic finally opened, Ms. Doe was trapped in her car for many hours, three days in a row, while being surrounded by anti-abortion protesters who were shouting at her, calling her a murderer. Id. When she finally made it into the clinic, it was surrounded by protesters, and the clinic was subjected to repeated bomb threats, necessitating evacuations of the clinic. Id. at 11. Ms. Doe stated that the experience was "devastating." Id. at 12.

This experience is shared not only by others who have had abortions, but by people who sought other kinds of medical care in buildings in which one tenant was an abortion provider. Kathryn Maxwell, of Canton, Mississippi, was four months into a high risk pregnancy due to her age and the fact that she was afflicted with asthma. Hearings at 18. She went to her obstetrician for a regular visit, accompanied by her 12 year old daughter, and was met by members of Operation Rescue, who told her that she would not be permitted to enter the building. Id. Both she and her young daughter were shown graphic pictures of fetuses at various stages of development. Id. Despite the fact that she repeatedly told the protesters that she was not going to have an abortion, Ms. Maxwell was forced to use the stairs rather than the elevator, and was repeatedly blocked on the staircase, excusing herself and pushing her way forward until she finally arrived at her doctor's office. Id. The police declined to provide assistance, stating that "if [they] did, there could be a potential riot." Id. at 19. Ms. Maxwell heard the receptionist from a psychiatrist's office complaining to the police, indicating that patients on medication were getting harassed by protesters, and were suffering adverse effects.



Id. Ms. Maxwell finally saw her doctor later that day, after the protesters had gone. Id.

In Washington, D.C., only a few short miles from the Supreme Court, the Hillcrest Women's Surgi-Center reports consistent anti-abortion violence and obstruction. Clark, "Abortion Clinics: Life Under Siege," Congressional Quarterly (April 13, 1995), reprinted in WESTLAW CG NEWS 4/13/95 at 1. The chanting of anti-abortion demonstrators can be heard inside the clinic, causing one nurse to report that the patients "get emotionally riled, and ask us, 'How can you let these people come here?'" Id. at 2.

These accounts illustrate the psychological and physical harm to patients of reproductive health care facilities which are the subject of anti-abortion violence and obstruction. The evidence demonstrates that the harm to this "captive audience" is not the result of the sort of "'insulting, and even outrageous, speech'" which must be tolerated "'in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" Madsen, 114 S. Ct. at 2529 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). Instead, this serious psychological and physical harm is the result of "targeted picketing" which is "so infused with violence as to be indistinguishable from a threat of physical harm." Id. (citing Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292-93 (1941)). The government has an interest in ensuring not only that its citizens have access to medical care, but also that such access is safe and non-threatening. Injunctions such as the one at issue in this case are necessary to serve that government interest.

In sum, the states have an interest in ensuring safe, orderly access to health care of all kinds, including reproductive health care. Each of the states' interests is significant; taken together, they provide overwhelming justification for an award of injunctive relief.

## II. THE INQUIRY INTO THE SCOPE OF AN INJUNCTION SHOULD BE FACT-BASED, AND THE INJUNCTION SHOULD BE SUFFICIENT TO PROTECT THE STATES' INTERESTS

The Madsen test requires that content-neutral injunctive provisions be analyzed to ensure that they "burden no more speech than necessary to serve a significant government interest."[6/] 114 S. Ct. at 2525 (citations omitted). This test is more rigorous than that which is applied to content-neutral statutory provisions, but less stringent than that which is applied to content-based statutes and regulations. Id. at 2524-25 (citations omitted).

Precisely what this means for any particular injunctive provision is less than certain. However, three guiding principles can be established. First, the level of "fit" between the government interest and the injunctive provision must be precise, but the injunction need not be the very least restrictive means of accomplishing the government's goals. Second, the inquiry pertaining to the proper scope of an injunction must be tied to the specific facts of the particular case, including the nature of the protests, the physical layout of the premises to be protected, and any other

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6/ The amici states assume that the instant injunction, like that which was scrutinized in Madsen, is content-neutral. The test for content-neutrality is "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" 114 S. Ct. at 2523 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(other citations omitted)). As in Madsen, "the fact that the injunction cover[s] people with a particular viewpoint does not itself render the injunction content or viewpoint based." Id. at 2524. The government's interest, as set forth above, is related to the deleterious effects of the conduct of anti-abortion protesters, and not to their message. As such, it survives the Court's test of content-neutrality.



considerations necessary to fashion relief which responds to the precise needs of the case. Finally, although the First Amendment rights of the protesters must be given due consideration, the injunction should be sufficient to protect the significant government interests which are implicated by violence and blockades at reproductive health care facilities.[7/]

### A. The Injunction Should be Narrowly Drawn, but Need Not be the Least Restrictive Alternative

The Madsen test represents an intermediate review of content-neutral injunctions, more rigorous than the test applied to content-neutral statutes, but less so than the test applied to content-based regulations. Id. at 2524-25 (citations omitted). Although it is clear that, in the context of intermediate review, the government interest must be "significant,"[8/] the required level of "fit" between the government interest and the injunction is less apparent.

Content-neutral statutes are scrutinized to determine that they are "narrowly tailored to serve the government's legitimate, content neutral interests . . . ." Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). Further, a content-neutral statute should "leave open ample alternative

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7/ Each of these points is discussed by the amici states without a detailed analysis of how it applies to the facts of this particular case. The application of these points of law is more appropriately discussed by the Respondents in light of their mastery of the record.

8/ Under Madsen's intermediate test, the government interest must be "significant," as opposed to "legitimate," on the one hand, Ward, 491 U.S. at 798 (1989)(state interest must be legitimate), or "compelling," on the other. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)(state interest must be compelling).

channels of communication." United States v. Grace, 461 U.S. 171, 177 (1983)(citations omitted).

A content-neutral legislative restriction on speech "need not be the least restrictive or least intrusive means" of serving the government interest. Ward, 491 U.S. at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id. at 800 (emphasis added).

On the other hand, a content-based restriction, or one which works an "absolute prohibition" on speech, "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." Grace, 461 U.S. at 177 (citing Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)(other citation omitted)). In such a case, a legislative restriction on speech must be the least restrictive means of achieving the government's interest, such that the ability of a court to identify a less restrictive alternative is fatal. Boos v. Barry, 485 U.S. 312, 329 (1988).

The Madsen test falls somewhere between these two polarities. Accordingly, under Madsen, there must be something more than a mere nexus between the injunction and the government interests, see, e.g., Grace, 461 U.S. at 181, but the injunction need not survive the "most exacting scrutiny." See, e.g., Boos, 485 U.S. at 321.

The District of Columbia Circuit's decision in National Organization for Women v. Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994), provides a helpful example. There, the court examined an injunction which prohibited persons from "inducing" and "encouraging" others to engage in trespassing or blockading clinics. Id. at 656. The



court explained that the district court intended this language to prohibit "inciting" illegal acts. Id. Since the word "inciting" has a more precise legal definition than do the words "inducing" and "encouraging," the court concluded that "the injunction introduces an easily avoidable measure of unclarity as to what speech and conduct is prohibited." Id. at 657. The court suggested that, with the substitution of the word "inciting," the "injunction [will] accomplish[ ] all it sets out to accomplish, while making it plain to all that no protected speech is impermissibly burdened." Id.

The District of Columbia Circuit struck precisely the sort of balance that is required by Madsen. It required that the language be sufficiently precise as to avoid vagueness and overinclusiveness, but also that it be adequate to serve the government's interests. Id. By correcting "an easily avoidable measure of unclarity," the court ensured that the injunction was not overly burdensome, but maintained the intended scope of relief. Id. It is this sort of sensitivity to the needs of the government, on the one hand, and the rights of persons to free speech, on the other, that is required by Madsen.

The test set forth by this Court is not capable of formulaic application. It does require clarity and care, but does not require perfect exactitude; it does require precision, but does not require "surgical precision." Madsen, 114 S. Ct. at 2525 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)). In short, Madsen requires that the court carefully craft an injunction which strikes a delicate balance between the states' significant interest and the "concomitant right of the people of free speech and assembly." Cox, 379 U.S. at 554 (citations omitted).

### B. The Inquiry Regarding the Scope of the Injunction Should be Fact Specific

An injunction "must be read in the context of its circumstances." Milk Wagon Drivers, 312 U.S. at 298. This Court tacitly acknowledged this well-established principle in Madsen. 114 S. Ct. at 2527 (citing Milk Wagon Drivers, 312 U.S. at 294) ("deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review").[9/] Accordingly, in reviewing the injunction crafted by the trial court in this case, this Court should not endeavor to establish universal rules about the propriety, or lack thereof, of any particular type of injunctive provision. Instead, the Court should determine the propriety of the injunction only in the context of this specific dispute.

This Court has agreed to review two injunctive provisions which were designed to protect access to reproductive health care facilities in Western New York. First, the trial court fashioned a fifteen-foot buffer zone around entrances to those medical facilities, as well as around "any person or vehicle seeking access to or leaving the facilities" except that two "sidewalk counselors" may enter the zone.[10/] Pro-Choice Network v. Schenck, 67 F.3d 377, 384 (2d Cir. 1995). Second, the injunction provides that, if a person indicates that he or she does not want to be counseled, or wants to walk away, the two protesters allowed inside the fifteen foot zone must "cease and desist," i.e., they must

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[9/] See also Madsen, 114 S. Ct. at 2532 (Stevens, J., concurring in part and dissenting in part)("appropriate deference should be given to the trial judge's familiarity with the facts of the underlying case").

[10/] The fifteen-foot zone around persons and vehicles is called a "bubble zone," as distinguished from a "buffer zone." A bubble zone is one that moves or "floats," whereas a buffer zone is stationary.



leave the zone but may continue their "counseling" and demonstrating so long as they remain at a distance of fifteen feet from the person entering or leaving the facility. Id. at 384-85.

The inquiry into the propriety of these injunctive provisions entails a close examination of the factual circumstances of a given case. Injunctions are equitable remedies. Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982). "'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.'" Id. at 329-30 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)). An injunction should be "adjusted to a particular situation . . . in accord with the settled practice of equity." Milk Wagon Drivers, 312 U.S. at 298 (citation omitted).

Equity demands that the scope and character of an injunction be controlled by the facts of a given dispute rather than by a set of universal rules, at least in part because an injunctive provision that adequately serves the government interest in one setting may not do so in another. For example, in Madsen, the Court struck down a broad 300-foot "no approach" zone, but recognized that, in a different case -- where there was "evidence that protesters' speech is independently proscribable . . . or is so infused with violence as to be indistinguishable from a threat of physical harm" -- such a zone might be appropriate. 114 S. Ct. at 2529. This Court refrained from stating a per se rule outlawing all injunctive "no approach" zones in recognition of the unlimited combinations of factors that may exist from case to case.

A specific type of injunctive provision might be more restrictive of speech in one factual setting but less restrictive in another. For example, although many

reproductive health care facilities have adjoining parking lots, so that a patient exits her car onto private property, this is not true in all cases. In Bridgeport, Connecticut, Summit Women's Center, a reproductive health care facility, is located at the intersection of two urban streets.[11/] The public sidewalk is immediately adjacent to the front and side entrances to the clinic. There are no parking facilities on the clinic's property or directly adjacent to the clinic; thus, the majority of those seeking access to the facility by car must park in a lot at least 100 feet away from the entrance to Summit.[12/] Additional parking is located approximately one city block away from the clinic's entrance.

In light of this unique set of facts, a court would be faced with the challenge of crafting an injunction designed to ensure that the injunction restricted "no more speech than necessary" to serve the government's significant interests in facilitating safe access to medical services and ensuring that pedestrian and vehicular traffic is not obstructed. 114 S. Ct. at 2525. If the court's only tool was a stationary zone, then in order to ensure that persons seeking access to the clinic were not subjected to future acts of "force, threats of force and physical obstruction"[13/] during their passage from their car to the clinic, the court would have to create a zone large enough to reach from the clinic entrance to the parking lots. Yet, such a large zone would effectively eliminate the right

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11/ United States and State of Connecticut v. Scott, et al., Civil Action No. 3:95CV01216 (AHN)(D.Conn. June 21, 1995).

12/ Patients travel to the Bridgeport clinic on foot, as well.

13/ 18 U.S.C. §248. The issue of the scope of injunctive relief would not be reached in a FACE case unless the plaintiffs were able to establish that, in the past, there had been violations of FACE, i.e, the use of force, threats of force or physical obstruction with intent to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services. Thus, for purposes of this example, the amici assume that such a history exists.



of protesters to picket the clinic and to engage in so-called "sidewalk counseling" in any meaningful proximity to the facility.

A reasonable floating bubble zone, on the other hand, would, in this factual setting, be significantly less restrictive of the free speech rights of protesters while simultaneously addressing the state interests. Rather than prohibiting all protest activity within a large area, the floating zone would result in a more precise restriction, allowing protesters to communicate their message in close enough proximity to be heard, but with enough distance between them and the clinic patient or staff to ensure against the use of violence and blockades. When coupled with a "cease and desist" provision, a bubble zone would be even less restrictive of speech, allowing protesters to approach targeted individuals with their message, compelling them to withdraw a few steps only if requested to do so. This example demonstrates that the only way to properly measure the extent to which a particular injunctive provision restricts speech is by reference to the facts of the specific dispute.[14/]

Similarly, the effectiveness of an injunction in serving the government interest in safe and orderly access to health care also must be measured by reference to the facts of a given dispute. For example, this Court in Madsen found that a 36-foot stationary buffer zone was sufficient to protect "the free access of patients and staff." 114 S. Ct. at 2526. However, in the example set forth above, a stationary 36-foot zone would leave patients and staff unprotected during a significant portion of their passage from their car to the clinic. What was sufficient protection in Madsen, unless expanded or combined with other injunctive relief, would

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14/ The Petitioners appear to agree with this analysis. (See Brief of Petitioners at 48 n. 23).

not be sufficient to prevent future instances of violence and obstruction at a facility with a very different physical layout.

Thus, in reviewing the injunctive relief in this case, this Court should refrain, as it did in Madsen, from establishing a rule that any type of injunctive provision is per se unconstitutional in all circumstances. Instead, the Court should be sensitive to the facts of the case, including the physical layout of the various facilities, as well as the nature of the blockades, harassment and intimidation which gave rise to the need for injunctive relief. Only in so doing can the Court be sure to provide adequate protections while burdening "no more speech than necessary." Id. at 2525.

### C. The Injunction Should be Sufficient to Serve the Significant State Interests

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." Cox, 379 U.S. at 554. Thus, while the free speech rights of anti-abortion protesters should be respected, an injunction issued on the basis of findings that the defendants have engaged in violence and blockading should be sufficient to serve the significant state interests upon which it is based. In other words, not only should the courts take care that an injunction is sufficiently limited to provide adequate "'breathing space to the freedoms protected by the First Amendment,'" Madsen, 114 S. Ct. at 2529 (quoting Boos, 485 U.S. at 322), but courts also should ensure that an injunction is sufficiently broad to serve the significant state interest in protecting safe and orderly access to health care.

This Court has repeatedly recognized that special protections are appropriate in the context of health care. In NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783-84 n. 12



(1979), the Court explained that "'[h]ospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, . . . and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.'" (quoting Beth Israel Hospital v. NLRB, 437 U.S. 483, 509 (1978)(Blackmun, J., concurring)). As the Court in Madsen recognized, the same is true of facilities which provide reproductive health care. 114 S. Ct. at 2528 (quoting NLRB v. Baptist Hospital, Inc., 442 U.S. at 783-84 n. 12).

Further, the Court has acknowledged that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation." International Society For Krishna Consciousness v. Lee, 505 U.S. 672, 684 (1992)(upholding ban on airport solicitation by religious group). So-called "sidewalk counseling" presents precisely the same risks. In both cases, "[t]he skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children and those suffering physical impairment and who cannot easily avoid the solicitation." Id. Just as it was appropriate for the government to restrict the religious solicitation in Lee, it is equally appropriate for the government to restrict the "sidewalk counseling" of anti-abortion advocates who use violence, blockades, fear and intimidation as means of duress against a captive audience.

Restrictions on conduct in other contexts have been upheld when necessary to protect ingress to and egress from public buildings, Cameron v. Johnson, 390 U.S. 611 (1968); to protect against targeted picketing of a residence, Frisby v. Schultz, 487 U.S. at 483; and to protect foreign embassies, Boos, 485 U.S. at 331-32.[15] This was so even in

[15] In Boos, the Court struck down a provision which prohibited the display of signs critical of foreign governments, but upheld a

the absence of the sort of history of violence and blockades which exists in the context of reproductive health care facilities.[16/] Here, especially in light of that history, restrictions on conduct for the purpose of protecting access to reproductive health care should be upheld, as well.

In other contexts, when the "exercise of free speech rights conflicts with another fundamental right," this Court has held that a restriction on speech satisfied even the most exacting scrutiny. Burson v. Freeman, 504 U.S. 191, 211 (1992). For example, in Burson, this Court upheld an ordinance which required solicitors to stand 100 feet from the entrances to polling places on the ground that government has a compelling interest in protecting the fundamental right to vote without "intimidation and fraud." Id. Again, the Court approved this content-based restriction on speech without any showing of a history of violence or blockades. Id. In contrast, here there have been findings of persistent harassment, intimidation and blockades which threaten the health and well-being of persons seeking to exercise their fundamental right of access to reproductive health care.[17/]

provision which prohibited congregation within a 500-foot zone surrounding foreign embassies – a significantly greater zone than that at issue here. 485 U.S. at 329, 331-32.

16/ In Cameron, there was a history of peaceful picketing along a march route which had the effect of obstructing ingress to, and egress from, public buildings. 390 U.S. at 614-15. In Frisby, anti-abortion protesters had picketed in an orderly and peaceful manner outside the residence of a physician who performed abortions. 487 U.S. at 476. In Boos, picketers wished to carry signs critical of foreign governments outside of foreign embassies. 485 U.S. at 315.

17/ See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 852-53 (1992)(quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)(other citations omitted))(decisions relating to procreation, contraception, family relationship and child rearing, including the decision "'whether to bear or beget a child,'" "are central to personal dignity and autonomy, [and, thus,] are central to the



Accordingly, the justification for imposing a restriction on the activities of the anti-abortion protesters in this case is even stronger than that supporting the restriction in Burson.

Physical assaults and blockades are not expressive conduct protected by the First Amendment. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993)(citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)). The fact that conduct may be engaged in for the purpose of expressing a point of view does not cloak such conduct in the protections afforded to speech. Id. at 2199 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)). Further, "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" Cox, 379 U.S. at 555 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)). None of these principles is any less sound in the context of abortion.

Simply because "the context here is abortion," the Court should not depart from its "First Amendment precedents and traditions . . . ." Madsen, 114 S. Ct. at 2534-355 (Scalia, J., dissenting). This Court has long recognized that "acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence." Milk Wagon Drivers, 312 U.S. at 294 (permitting restriction on picketing which is enmeshed with violence). The record of violence and blockades, both nationwide and in Buffalo, New York, was significant enough to cause Congress to

liberty protected by the Fourteenth Amendment"). As the Second Circuit stated, the evidence in this case demonstrates that what the petitioners claim is peaceful protest is, in fact, a "constructive blockade" characterized by "harassment and intimidation" which "causes stress and sometimes even physical injury to the patients and medical staff." Pro-Choice Network v. Schenck, 67 F.3d 377, 383 (2d Cir. 1995).

provide a federal cause of action. House report at 7; Senate report at 9. It also is significant enough to warrant a sufficiently broad judicial remedy.

## CONCLUSION

The states have an interest in ensuring safe and orderly access to health care, including reproductive health care. This interest encompasses concomitant interests in controlling the burdens on, and costs of, law enforcement, as well as in medical safety and privacy. These interests, taken together, are more than sufficient to justify an award of injunctive relief which is carefully crafted to burden no more speech than is necessary when considered in the context of the facts of the particular case, while simultaneously being sufficiently broad to protect the interests of the states.

For these reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

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